BRB No. 06-0179 BLA

MORRIS A. KINSLEY, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BERNICE MINING & CONTRACTING, INCORPORATED	)	DATE ISSUED: 11/24/2006
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Gregory J. Fischer and Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-5059) of Administrative Law Judge Janice K. Bullard on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30

U.S.C. §901 *et seq.* (the Act). Claimant filed his application for benefits on December 22, 2003. Director's Exhibit 2. In a Proposed Decision and Order dated July 8, 2004, the district director awarded benefits. Employer requested a hearing, which was held on March 4, 2005. The administrative law judge issued her Decision and Order Awarding Benefits on October 12, 2005. As an initial matter, the administrative law judge determined that employer failed to demonstrate good cause for the admission of ten x-ray readings by Dr. Fino, which were proffered by employer in excess of the evidentiary limitations. The administrative law judge stated that she declined to act on behalf of employer by choosing from Dr. Fino's multiple readings "the number that complies with the evidentiary limitations[,]" therefore, she excluded Dr. Fino's readings from consideration at Section 718.202(a)(1). Decision and Order at 5. On the merits, the administrative law judge found that claimant established the existence of simple and complicated pneumoconiosis. The administrative law judge noted that because claimant established complicated pneumoconiosis, claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. 30 U.S.C. §921(c)(3). The administrative law judge also determined that claimant had established all the requisite elements of entitlement, including that he was totally disabled due to simple coal workers' pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge erred in failing to find that employer had established good cause for submitting x-ray readings by Dr. Fino that were submitted in excess of the evidentiary limitations. Employer's Brief at 7-9. Employer further asserts that the administrative law judge erred by failing to admit and consider, as affirmative evidence, at least one of the x-ray readings by Dr. Fino pursuant to 20 C.F.R. §725.414(a)(3)(i). Employer's Brief at 9. On the merits of entitlement, employer contends that the administrative law judge improperly substituted her own opinion for that of a reasoned medical opinion on the issue of whether the miner's pneumoconiosis arose out of his coal mine employment. Employer's Brief at 5. Employer further asserts that Dr. Talati's opinion is insufficient as a matter of law to support claimant's burden of establishing that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Claimant responds to employer's appeal, urging affirmance of the administrative law judge's evidentiary ruling and his award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

Exclusion of Dr. Fino's multiple x-ray readings:

Employer challenges the administrative law judge's exclusion of Dr. Fino's multiple x-ray readings. At the hearing, employer proffered a medical report by Dr. Fino, which contained his interpretation of ten chest x-rays. Employer's Exhibit 2. Employer

argued that the ten x-ray readings contained in Dr. Fino's report should be admitted under the good cause exception to the evidentiary limitations pursuant to 20 C.F.R. §725.456(a). Transcript at 9-12. The administrative law judge directed the parties to brief the issue of good cause. The administrative law judge further instructed that, in the event that she determined that good cause had not been demonstrated, employer should alternatively identify which x-ray readings were to be admitted as affirmative and rebuttal evidence under Section 725.414. Hearing Transcript at 11-12. In her Decision and Order, the administrative law judge stated that employer's argument that the readings were relevant to accurately diagnose the presence or absence of pneumoconiosis failed to demonstrate good cause for admission of all ten of the x-ray readings:

> In his report Dr. Fino stated that a review of a serial of chest [x]-rays was necessary to make an accurate diagnosis of pneumoconiosis but failed to explain why viewing one isolated chest [x]-ray could result in a false diagnosis of pneumoconiosis whereas a review of a serial of chest [x]-rays would not. Specifically, Dr. Fino stated that all of the chest [x]-rays he reviewed were similar. Yet the physician failed to explain why he could not have come to the same conclusions regarding the presence of rounded opacities in the middle and lower lung zones based on one chest [x]-ray versus a series of chest [x]-rays if they were all similar. Dr. Fino's explanation is not well-reasoned, and I find that it does not demonstrate good cause to exceed the evidentiary limitations.

Decision and Order at 5. The administrative law judge therefore found that "Dr. Fino's interpretation of [x]-rays beyond the evidentiary limitations may not be considered in determining the presence of pneumoconiosis under [Section] 718.202(a)(1)." *Id*. Because employer did not follow the administrative law judge's instruction to designate Dr. Fino's readings as either affirmative or rebuttal readings in accordance with Section 725.414, the administrative law judge declined to consider any of Dr. Fino's readings relevant to Section 718.202(a)(1).[1] Decision and Order at 5.

We affirm the administrative law judge's finding that employer failed to demonstrate good cause for the admission of evidence in excess of the evidentiary limitations based solely on Dr. Fino's assertion that the x-ray readings were relevant for an accurate diagnosis of pneumoconiosis. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-59 (2004) (*en banc*). Moreover, because employer failed to comply with the judge's specific instruction at the hearing to identify which readings by Dr. Fino should be considered as either affirmative or rebuttal evidence under Section 725.414(a)(3)(i),

[1] We note, however, that the administrative law judge discussed Dr. Fino's interpretation of the x-ray evidence relevant to 20 C.F.R §§718.202(a)(4) and 718.203(b).

(ii), we see no error in her refusal to designate the parties' evidence in this case. We therefore affirm the administrative law judge's decision to exclude all of Dr. Fino's x-ray readings from consideration, as this was a proper exercise of discretion. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*) (an administrative law judge has broad discretion in handling procedural matters and is afforded discretion in dealing with matters of fairness and judicial efficiency); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984).

Merits of Entitlement:

Employer challenges the administrative law judge's finding at Section 718.203(b) that claimant established that his pneumoconiosis arose out of coal mine employment. Employer specifically asserts that that the administrative law judge erred in her treatment of Dr. Duncan's opinion relevant to this issue.[2] Employer's Brief at 5-7. We disagree. Contrary to employer's assertion, the administrative law judge properly determined that since claimant had established the existence of clinical pneumoconiosis, and at least ten years of coal mine employment, claimant was entitled to the rebuttable presumption that his pneumoconiosis arose out of coal miner employment. *See* 20 C.F.R. §718.203(b). In addressing whether employer had rebutted that presumption, the administrative law judge properly noted that with regard to Dr. Duncan's interpretation of the February 20, 2004 x-ray, the doctor made a written notation that "'the above described findings are probably related to asbestos exposure with associated nodular fibrosis or less likely could be related to coal workers' disease.'" Decision and Order at 11; Employer's Exhibit 3. The administrative law judge permissibly considered Dr. Duncan's additional statement regarding the etiology of the x-ray findings to be speculative, noting that Dr. Duncan could not state unequivocally that the x-ray findings were not due to coal dust exposure.[3]

[2] Employer has not raised any error with regard to the administrative law judge's determination that claimant established the existence of simple coal workers' pneumoconiosis, and that claimant is totally disabled by a respiratory or pulmonary impairment. Thus, we affirm, as unchallenged on appeal, the administrative law judge's findings at 20 C.F.R. §§718.202(a) and 718.204(b).[2] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Employer's position appears to be that claimant is unable to carry his burden of proof to establish a causal relationship because Dr. Duncan's opinion fails to state that claimant's x-ray findings are due to coal mine employment. Employer states that the administrative law judge "cannot simply draw a conclusion for Dr. Duncan that the findings identified on this chest x-ray film by the doctor are causally related to coal mine dust exposure." Employer's Brief at 6. We note, however, that employer's argument ignores that once the presumption at Section 718.203(b) was invoked, the burden shifted from claimant to employer to disprove that claimant's pneumoconiosis was not due to his

See Justice v. Island Creek Coal Co., 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 11. Moreover, the administrative law judge noted that there was no evidence of record to establish that claimant had been exposed to asbestosis, while "[t]he record indisputably reflects that [c]laimant was exposed to coal mine dust for at least 30 years." Decision and Order at 11. Because the administrative law judge found insufficient evidence to rebut the Section 718.203(b) presumption, we affirm the administrative law judge's finding that claimant suffers from pneumoconiosis arising out of his coal mine employment.

With respect to the issue of disability causation at Section 718.204(c), employer asserts that Dr. Talati's opinion is insufficient as a matter of law to satisfy claimant's burden of proof because Dr. Talati failed "to identify whether coal workers' pneumoconiosis was a substantial contributing factor to the miner's pulmonary impairment." Employer's Brief at 11. Employer further asserts that Dr. Talati's opinion fails to address that the miner's smoking history, "exceeding 100 pack years[,]" significantly outweighs his coal mine employment. *Id*.

Employer's assertions of error are without merit. In weighing the conflicting evidence relevant to whether claimant established disability causation at Section 718.204(c), the administrative law judge properly found that Dr. Talati was the only physician to offer a reasoned opinion relevant to disability causation, and since Dr. Talati opined that claimant's respiratory impairment was secondary to COPD caused by smoking and his coal workers' pneumoconiosis, the administrative law judge also properly found that claimant had carried his burden of proof. In contrast, both Dr. Fino and Dr. Levinson attributed claimant's respiratory impairment to smoking, but since they did not believe that claimant suffered from pneumoconiosis, the administrative law judge properly rejected their opinions under Section 718.204(c). *See Soubik v. Director, OWCP*, 366 F.3d 222, 234, 23 BLR 2-85, 2-99 (3d Cir. 2004). Furthermore, contrary to employer's assertion, claimant is not required to establish the degree of disability caused separately by pneumoconiosis and smoking to satisfy his burden of proof at Section 718.204(c). *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). To the extent that Dr. Talati opined that claimant's respiratory condition was equally attributable to smoking and coal dust exposure, the administrative law judge properly found that claimant established that his total disability was due to pneumoconiosis. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). Moreover, since employer does not specifically challenge the weight accorded its medical

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coal mine employment. Because Dr. Duncan's equivocal opinion did not serve to rebut the 718.203(b) presumption, the administrative law judge properly found that employer failed to carry its burden of proof.

experts on this issue, we affirm as supported by substantial evidence, the administrative law judge's finding at Section 718.204(c) that claimant's is totally disabled due to pneumoconiosis. We, therefore, affirm the administrative law judge's award of benefits.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge